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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY  ~~DEPUTY~~

NO. 42977-2-II

COURT OF APPEALS  
THE STATE OF WASHINGTON  
DIVISION II

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KENNETH HUNTINGTON, RESPONDENT

Vs.

JENNIFER MUELLER, APPELLANT

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APPELLANT'S REPLY BRIEF

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## TABLE OF CONTENTS

Table of Authorities .....	iii
I. Reply Statement of the Case .....	1
II. Argument .....	2
A. Farmers Insurance Company is not a Party .....	2
B. Mueller improved her position by appealing .....	2
C. Respondent's fee was excessive .....	8
III. Conclusion .....	10

**TABLE OF AUTHORITIES**

**Cases**

*Bowers v. Transamerica Title Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983) ..... 9

*Christie-Lambert Van & Storage v. McLeod*, 39 Wn. App. 298, 304, 693 P.2d 161 (1984)..... 7

*Cormar v. Sauro*, 60 Wn. App. 622, 806 P.2d 253 (1991) ..... 3

*Gass v. McPhersons, Inc., Realtors*, 79 Wn. App. 65, 899 P.2d 1325 (1995) ..... 6

*Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998) ..... 8

*Mazon v. Krafchick*, 158 Wn.2d 440, 143 P.3d 1168 (2006)..... 5

*Perkins Coie v. Williams*, 84 Wn. App. 733, 740, 929 P.2d 1215 (1997)... 9

*Sultani v. Leuthy*, 86 Wash. App. 753, 943 P.2d 1122 (1997)..... 4, 5

*Tran v. Yu*, 118 Wn. App. 607, 75 P.3d 970 (2003) ..... 7

*Tribble v. Allstate*, 134 Wn. App. 163, 139 P.3d 373 (2006) .....9

*Washburn v Beatt Equipment Co.*, 120 Wn.2d 246, 294, 840 P.2d 860 (1992). ..... 4

**Statutes**

4.22.070 ..... 3, 4, 5, 6

RCW 4.22.030..... 4

RCW 4.22.040(1) ..... 5

RCW 7.06.060(1) ..... 2, 5

**Rules**

ER 411 ..... 1, 2

MAR 7.3.....2, 6

**Treatises**

16, Washington Practice § 12:24.....4

**I.**  
**REPLY STATEMENT OF THE CASE**

This case concerns a collision between two vehicles. Mr. Huntington was a passenger in one of the vehicles. The parties to this action are Mr. Huntington, Mrs. Henry, and Ms. Mueller. (CP 1) No insurance company was a party to this action. Respondent has improperly attempted to inject the issue of liability insurance into this case, in violation of ER 411. The reference to “Farmer’s Defendant” is inaccurate and prejudicial. Whether or not Appellant, or any other party, is insured has no bearing on any issue in this case. The Court should give no consideration to these references and should consider striking Respondent’s Brief for this improper tactic.

This is a case involving joint and several liability. Each defendant has now paid one-half of the judgment. (CP 115) The only issue in this appeal is whether Appellant improved her position by filing a Request for Trial de Novo. It is undisputed that Appellant paid almost Twenty Thousand Dollars less than the arbitration award. Her award, and her decision to exercise her constitutional right to a jury trial, had merit. Since Ms. Mueller improved her position, Mr. Huntington is not entitled to an award of attorney fees and cost. The trial court should be reversed.

## **II. ARGUMENT**

### **A. FARMERS INSURANCE COMPANY IS NOT A PARTY TO THIS CASE.**

Respondent's frequent reference to "Farmers" and the "Farmer's Defendant" should be stricken from the record. Whether or not Appellant is, or is not, named in a policy of liability insurance is not relevant to any issue in the case. This is prohibited by ER 411. It is merely an attempt to create unfair prejudice against Appellant Jennifer Mueller. Statements such as "Farmers always appeals," are unsupported by any evidence in the record and are irrelevant. The only issues before the Court are related to the parties to this action and the result arrived at by the jury.

### **B. MS. MUELLER IMPROVED HER POSITION BY GOING TO TRIAL.**

Respondent argues that he is entitled to attorney fees because the judgment against all defendants was higher than the arbitration award, even though Ms. Mueller wound up paying almost Twenty Thousand Dollars less than the arbitration award. This is an incorrect reading of the statute and court rule. RCW 7.06.060(1) and MAR 7.3 do not say that the Request for Trial de Novo must result in a smaller judgment. It states that, to avoid paying fees, the party appealing the arbitration award is liable for

fees only if she “... fails to improve his or her position on the trial de novo.” In a case with multiple defendants, the focus is not on the size of the judgment; it is on the amount each defendant must pay. If the defendant who appeals the arbitration pays less after the trial, she has improved her position. In this case, the facts are very clear. Ms. Mueller substantially improved her position by appealing.

*Cormar v. Sauro*, 60 Wn. App. 622, 806 P.2d 253 (1991), cited by Respondent on page 5 of his brief, is distinguishable from this case. *Comar* is a case in which judgment was entered one defendant. *Comar, Supra*, at 623. The principal amount of the judgment was less than the arbitration award, but the judgment was higher than the award because the trial court awarded pre-judgment interest, which the arbitrator had declined to award. This led to a larger judgment, based on issues that were raised at the arbitration. That is not the situation in this case. This is a multiple party case, and the party appealing the arbitration award was required to pay substantially less to Respondent, because she improved her position at trial.

Respondent’s brief, and the trial court’s ruling, show a misunderstanding of the holding in *Sultani v. Leuthy*, 86 Wn. App. 753, 759, 943 P.2d 1122 (1997). That case does not say that the appealing

defendant avoided joint and several liability. Respondent refers to pages 755-756 for that position. This is what the court actually holds:

The matter proceeded to mandatory arbitration under RCW 7.06. On April 14, 1995, the arbitrator awarded Sultani \$38,535.20 against the four defendants jointly and \*756 severally. Following the arbitration, Pollard filed a request for trial de novo under MAR 7.1. Neither Leuthy nor Shrewsbury filed similar requests, and Gough failed to appear. At the conclusion of the trial de novo, the jury found that the defendants' negligence was the proximate cause of Sultani's injuries, and awarded Sultani \$55,250 in damages. **The damages were apportioned among the defendants based on percentage of fault** as follows: Leuthy: \$32,873.75; Gough: \$14,088.75; Shrewsbury: \$4,558.13; Pollard: \$3,729.37. [Emphasis supplied]

*Sultani*, at 755-756. Apportioning fault is allowed by RCW 4.22.070. It does not eliminate joint and several liability. The *Sultani* case and this case both had fault-free plaintiffs. Joint and several liability is guaranteed in cases in which there are multiple defendants against whom judgment is entered and a fault-free plaintiff. See: RCW 4.22.030 and *Washburn v Beatt Equipment Co.*, 120 Wn.2d 246, 294, 840 P.2d 860 (1992). This misunderstanding of the holding in *Sultani* is also the basis of the incorrect decision by the trial court in this case.

On page 3 of the trial court's memorandum opinion (CP 92) the court misreads the holding in the *Sultani* case.

"In the case of *Sultani v. Leuthy*, 86 Wn. App. 753, 943 P.2d 1122 (1997), which was a case involving four

defendants found jointly and severally liable at arbitration, the trial de novo resulted in an increase in the total amount of damages awarded to the Plaintiff. **However, fault had been reallocated finding several liability.**” [Emphasis supplied]

This paragraph illustrates the court’s misunderstanding of RCW 4.22.070. Allocation of fault does not equal several liability. Joint and several liability are preserved because the Plaintiff, in this case and in *Sultani*, are fault free. This is discussed at 16 Wash. Prac. § 12:24:

Where the plaintiff is not at fault, each defendant is jointly and severally liable for the combined percentage shares of all those against whom judgment is entered. [Citing *Mazan v. Krafchick*, 158 Wn.2d 440, 144 P.3d 1168 (2006).

Mr. Huntington was a passenger in Mrs. Henry’s vehicle. The jury did not assess any fault to him. Mr. Sultani was injured in two rear-end auto accidents and was found to be fault free. Both plaintiffs obtained judgments for which all defendants were jointly and severally liable. In both cases, the jury apportioned fault. Apportionment of fault does not convert the liability of a party from joint and several to several.

The affect of apportionment is to create a right of contribution. However, contribution is only allowed in cases in which the parties have been found jointly and severally liable. See: RCW 4.22.040(1), *Mazon v. Krafchick, Supra*, at 451. The contribution statute, RCW 4.22.040(1) and RCW 4.22.070 only allow contribution, based on comparative fault

between defendants, in cases of joint and several liability. If Ms. Mueller had not appealed the arbitration award, which found her 100% liable, she would have no right of contribution. By exercising her constitutional right to a jury trial, she substantially improved her position. Mr. Huntington's increased award is irrelevant to the issue presented by MAR 7.3 and RCW 7.06.060(1). He is not entitled to attorney fees.

Respondent also bases his argument on his ability to collect the entire judgment from either defendant. This merely shows that there is joint and several liability. The same argument was addressed and discounted in *Sultani, Supra*, at 759:

Thus, although the appellants had a right of contribution against each other and against the other defendants as a result of the arbitration award, there still existed the possibility that one or both appellants, rather than all four defendants, would have borne the full responsibility of making Sultani whole. Sultani's argument would force this court to speculate as to whether the appellants would have been able to obtain a contribution from one another and from the other defendants, and if so, for how much.

The apportionment of liability did not eliminate joint and several liability, it created a right of contribution between the defendants. This right did not exist at the conclusion of the arbitration, because the arbitrator found that Mrs. Henry was not negligent. "The statute [RCW 4.22.070] makes comparative fault the sole basis for contribution. It

follows that when a contribution defendant has no comparative fault, there is no basis for contribution.” *Gass v. McPhersons, Inc., Realtors*, 79 Wn. App. 65, 71, 899 P.2d 1325 (1995). Ms. Mueller’s appeal of the arbitration award allowed her to gain a right of contribution, thereby substantially improving her position.

The issues in the arbitration and in the jury trial of this case were identical. This distinguishes this case from *Christie-Lambert Van & Storage v. McLeod*, 39 Wn. App. 298, 304, 693 P.2d 161 (1984). In that case, the trial de novo included issues which were not before the arbitrator. When deciding if a party has improved its position, our courts compare the award at arbitration to the trial result. This has been referred to as comparing comparables. *Tran v. Yu*, 118 Wn. App. 607, 613, 75 P.3d 970 (2003). The arbitration in this matter resulted in Ms. Mueller owing Mr. Huntington \$50,000.00. The trial resulted in her paying \$30,080.67.

This improvement is not theoretical. The record in this case establishes that one half of the judgment in this case has been paid by Ms. Henry. (CP 115) This is proof that Ms. Mueller improved her position by appealing the arbitration award. Plaintiff’s recovery of a larger judgment than the arbitration award is irrelevant. Since Ms. Mueller improved her position in the trial de novo, Respondent Huntington has no right to recover attorney fees.

### C. RESPONDENT'S FEE REQUEST WAS EXCESSIVE

This case did not present particularly novel issues or complicated areas of law. It was admitted by both defendants that Mr. Huntington was fault free. Plaintiff's only burden of proof was on damages. Any liability issues were between the two defendants. Since Mr. Huntington was guaranteed joint and several liability, he had no interest in apportioning fault between the two defendants. The injuries were soft tissue neck and back strains and a claim of dental damage. While no trial is easy, this was not a case that would justify a large grant of fees or a *Lodestar* multiplier. It was also not a case that required multiple attorneys. Under the circumstances, the trial court should have limited the fees to one attorney's efforts.

The *Lodestar* method basically involves the number of reasonable hours times a reasonable fee. *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632, 966 P.2d 305 (1998). The party seeking a deviation from this has the burden of showing that the case was extraordinarily difficult or success was contingent.

After the lodestar has been calculated, the court may consider the necessity of adjusting it to reflect factors not considered up to this point. "The burden of justifying any deviation from the 'lodestar' rests on the party proposing the deviation." *Copeland v. Marshall*, 641 F.2d at 892. Adjustments to the lodestar are considered under two broad

categories: the contingent nature of success, and the quality of work performed.

*Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 598, 675 P.2d 193 (1983). A desire to make a plaintiff whole is not a permissible consideration. *Tribble V. Allstate Property and Casualty Company*, 134 Wn. App. 163, 173, 139 P.3d 373 (2006). In this case, Plaintiff's recovery from at least one defendant was almost guaranteed. There was very little contingency. As discussed above, the damage issues were not particularly complex. In order to have a fee award multiplier award applied, there must be a showing that the result was greater than what could be expected of a competent attorney.

In order to award fees, a court must make specific findings. It made no findings that refer to any insurance company. This court should give these arguments no consideration. The Request for Trial de Novo in this case resulted in a substantial improvement of Ms. Mueller's position, thereby validating the decision to appeal and exercise her constitutional right to a jury trial. Requiring the Plaintiff to prove his case is not an unreasonable request.

### **III. CONCLUSION**

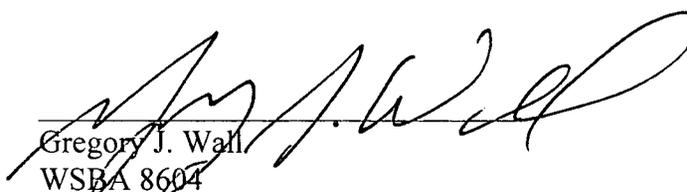
The fundamental error made by the trial court was focusing on the size of the judgment, rather than the improvement in the appealing party's position and on the amount Respondent received, rather than the amount Ms. Mueller wound up paying. The statute and the rule do not say that the party seeking a Trial de Novo must obtain a lower judgment than the arbitration award, they focus on whether the appealing party improves his or her position. Here, there is no doubt that Ms. Mueller improved her position by almost twenty thousand dollars. This was clearly a meritorious appeal.

The trial court also misunderstood the role of joint and several liability in this case. The existence of joint and several liability has no affect on whether or not Ms. Mueller improved her position. In fact, Defendant Henry has already paid one-half of the judgment. By requesting a Trial de Novo, Ms. Mueller created a right of contribution that would not exist if the arbitration award had been confirmed. The appeal of that award was obviously meritorious. It resulted in a substantial improvement of Ms. Mueller's position. This eliminates any claim for fees by the Plaintiff.

The trial court's order granting fees should be reversed.

Respectfully submitted this 28th day of June, 2012.

**WALL LIEBERT & LUND P.S.**

A handwritten signature in black ink, appearing to read "Gregory J. Wall", is written over a horizontal line. The signature is fluid and cursive.

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STATE OF WASHINGTON

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THE COURT OF APPEAL, DIVISION II  
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STATE OF WASHINGTON

KENNETH HUNTINGTON,

Plaintiff,

vs.

JENNIFER A. MUELLER and "JOHN  
DOE" MUELLER, wife and husband, and  
the marital community; and JACQUELINE  
HENRY and "JOHN DOE" HENRY, wife  
and husband, and their marital community,

Defendants.

Court of Appeals Case No. : 42977-2-II

Clallam Co. Sup. Ct. No. 08-2-00996-6

CERTIFICATE OF SERVICE

The undersigned certifies that on the 29<sup>th</sup> of June, 2012 she caused a copy of the following documents:

1. Appellants Reply Brief;
2. Certificate of Service

to be served on the parties listed below by the methods indicated:

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8 I certify under penalty of perjury of the laws of the State of Washington that the  
9 foregoing statements are true and correct.

10 Dated at Port Orchard, Washington.

11   
12 \_\_\_\_\_  
SANDRA RIVAS  
13 LEGAL ASSISTANT